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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 672.

SOUTHGATE NELSON CORPORATION,
Petitioner,

vs.

ELIZABETH J. QUINN,
Respondent.

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION.

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The question here involved is one of the local law of agency and the decision of the Circuit Court of Appeals is in conflict with all the other decisions on the point 5

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Southgate Nelson Corporation respectfully submits the following comments in reply to the respondent's brief:

Respondent seeks to sustain the decision of the Circuit Court of Appeals by contending that the petitioner was an independent contractor or an owner *pro hac vice*, as shown by the following statements (p. 7):

> "Yet, notwithstanding all this clear evidence of being an independent contractor, the petitioner would seriously urge that the Southgate Nelson Corporation was a mere intermediate agent of the Maritime Commission, and that the ship's officers were only lesser employees, sub-agents, for whose negligence the Southgate Nelson Corporation would not be liable."

(p. 9):

> "Even had the Maritime Commission paid the salaries of the ship's officers, yet, if Southgate Nelson Corporation retained the right to give them orders and to direct their activities, they were employees of Southgate Nelson Corporation."

(p. 13):

> "As between the Southgate Nelson Corporation and the ship's officers, the corporation was a principal. It was in the same category as an owner *pro hac vice.*
>
> • • • • • •
>
> "The Southgate Nelson Corporation, by statute, and under the terms of the agreement, was an independent contractor and agent, directly liable for the torts of its own employees."

Respondent disposes of the cases construing similar managing agency contracts by saying that those agreements were with the Shipping Board, this one is with the Maritime Commission and that this is a temporary agreement (p. 3):

> "From a reading of said petition and brief one would think that the Temporary Operating Agreement was one of the old Shipping Board agreements, commonly called the M. O. 3 and the M. O. 4 forms. All citations are in respect of those old contracts.
>
> "Such is not the case, and the decisions and opinions interpreting those old forms have absolutely no pertinency. Those old agreements were with so-called Managing Agents. They were strictly sub-agency contracts."

The Elkton, 86 Fed. (2d) 201, is specifically disposed of by stating (p. 14):

> "The Elkton decision merely interpreted the particular contract involved in that case."

Yet Judge Learned Hand described the contract in that case as follows:

> "* * * The Shipping Board appointed the company 'its Agent to manage, operate and conduct the business of such vessel as it * * * may assign to the Agent,' and the company agreed to act as such 'in accordance with the directions' of the Board. The company was to 'man, equip, victual and supply' the vessels as the Board required, and to pay all expenses and maintain them in seaworthy condition, all on the Board's account. It was to issue all documents on the Board's form, appoint sub-agents, collect freights which it must deposit in a bank approved by the Board and in the Board's name, and for which it was to account on forms prescribed by the Board. For this the company was to be paid in percentages on the gross receipts including salvage; out of these it was to bear its 'administrative and general expenses of every nature,' not including brokerage however, or commissions 'for agency services rendered at foreign ports.' * * *."

The agreement in this case between the petitioner and the Maritime Commission provided (R. 14-15):

> "The Managing Agent agrees to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe, and to certify or approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operation and conduct of business of the vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied."

In the case of the *Waukegan* the owner paid directly all operating expenses. In *The Elkton* the managing agent paid them and then was reimbursed by the owner. The petitioner had less control over the *Waukegan* than the managing agent involved in the *Elkton* case had over that vessel. The *Waukegan* agreement was just as clearly one of agency as was the *Elkton*.

The business being conducted was the Maritime Commission's business and the losses and profits were those of the Maritime Commission. Petitioner merely received its own overhead expenses for its services and was not in any sense either an independent contractor or an owner *pro hac vice*.

Respondent recognizes that unless petitioner was an independent contractor on principles of agency it should not be held liable (p. 10):

> "We therefore ignore the cases cited in the petition with regard to subordinate servants, intermediate agents and subagents. The premise of intermediate agent having fallen, the argument based thereon must fall."

The Circuit Court of Appeals did not find, as claimed by the respondent, that the petitioner was an owner *pro hac vice* or an independent contractor, but held that even though the Maritime Commission was the principal, the petitioner was liable because it exercised some supervision or control over the officers and crew of the *Waukegan*, although it was not claimed that they directed or participated in any of the acts of negligence involved. The Court stated (R. 113):

> "* * * Appellant contends that the judgment against it was erroneous because the United States or the Maritime Commission is liable to appellee; it

> cites an opinion to the effect that the United States is liable, by the Attorney General, in 1925, construing a form of contract used by the United States Shipping Board, which appellant asserts to be similar to that involved here. But, assuming that there is such a similarity and that either the United States or the Maritime Commission is liable to appellee, it does not follow that appellant is exculpated. That a principal is liable for a wrong does not necessarily immunize his agent. (Citations) The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow. * * *"

This reasoning of the Court the respondent makes no attempt to support or justify.

The question here involved is one of the local law of agency and the decision of the Circuit Court of Appeals is in conflict with all the other decisions on the point.

Respondent states (bottom of p. 10):

> "* * * Even the interpretation of the operating agreement is a matter of state law."

With this we are in accord, but we are not here dealing with any question of negligence of the managing agent except by virtue of the doctrine of *respondeat superior*, and the doctrine of *respondeat superior* cannot apply unless the petitioner was either an independent contractor or an owner *pro hac vice*. All the decisions in the State courts which we have been able to find and all the opinions of the text writers are to the effect that a managing agent is not liable for the torts of sub-agents employed by him in his

principal's business and with his principal's authority. These authorities are recited in the petitioner's main brief. Respondent has cited no cases to the contrary.

The decision of the Circuit Court of Appeals on this important point of the law of agency will cause great confusion not only in contracts between the Government and private operators in the operation of government owned merchant vessels, but in all fields of agency unless it is corrected by this Court.

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

ARTHUR M. BOAL,
Counsel for Petitioner.